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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/776,369	02/10/2004	Bret O. Baynham	2380.007	3198
21917	7590	07/18/2006	EXAMINER	
MCHALE & SLAVIN, P.A. 2855 PGA BLVD PALM BEACH GARDENS, FL 33410			CUMBERLEDGE, JERRY L	
			ART UNIT	PAPER NUMBER
			3733	

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Please find below and/or attached an Office communication concerning this application or proceeding.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 states "...said first and second bars each having a screw hole..." and claim 2 states "...screw holes in said first bar on each side of said elongated shaft..." It is ambiguous as to whether applicant is claiming precisely one hole in the bar, or whether the bar has multiple holes. Examiner suggests the use of the phrase --at least one screw hole-- in claim 1.

Claims 2, 3, 7, 15 and 16 state "...a [or said] clip having a retainer spanning each of said screw holes..." It is unclear whether applicant is referring to only the screw holes on each respective bar, or generally to all of the screw holes in the entire plate. It appears from the applicant's disclosure that the applicant intends for the retainer to span across the holes on each specific bar and not the entire plate, and the examiner will use that interpretation throughout this office action.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 as best understood, are rejected under 35 U.S.C. 102(b) as being anticipated by Michelson (US Pub. 2002/0188296 A1).

Michelson discloses a dynamic spinal plate comprising: an elongated shaft 852 (Fig. 40 below) with a proximal surface and a distal surface (Fig. 40 below), the elongated shaft having a first bar 804 (Fig. 40 below) near one end, the shaft having an opposite end (Fig. 40 below), at least a second bar 866 (Fig. 40 below), said first and said second bars each having a screw hole 826 (Fig. 40 below), a clip (Fig. 41 below) attached to the second bar, the clip having a retainer 902 (Fig. 41 below) spanning the screw hole. Michelson further discloses the first bar being fixed to the shaft (Fig. 40 below), screw holes 826 (Fig. 40 below) in the first bar on each side of the elongated shaft, a clip (Fig. 41 below) attached to the first bar, the clip having a retainer 902 (Fig. 41 below) spanning each of the screw holes. Michelson further discloses the second bar extending transverse to the elongated shaft (Fig. 40 below), screw holes 826 (Fig. 40 below) in the second bar, one on each side of the elongated shaft, the clip (Fig. 41 below) attached to the second bar having a retainer 902 (Fig. 41 below) spanning each of the screw holes. The elongated shaft has a longitudinal groove (Fig. 40 below) (paragraph 0110, lines 3-8) along each side; the second bar includes a central depression (Fig. 40 below) with shoulders on each side (Fig. 40 below). A third bar 802 (Fig. 40 below) is slidably attached near the opposite end of the elongated shaft (Fig. 40). The third bar extends transverse to the elongated shaft (Fig. 40); there are screw

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holes 826 (Fig. 40) in the third bar on each side of the elongated shaft, a clip (Fig. 41 below) fixed to the third bar having a retainer 902 (Fig. 41 below) spanning each of the screw holes. The third bar includes a central depression (Fig. 40 below) with shoulders (Fig. 40 below) on each side. The plate has teeth formed in the distal surface along its length (Fig. 40 below). The teeth are angled (Figs. 11 and 12 below).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 9-20, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Michelson (US Pub. 2002/0188296 A1) in view of Keller (US Pat. 5,234,431).

Michelson discloses the claimed invention except for the clip having a pawl portion seated between adjacent teeth on the distal side of the plate.

Keller discloses the clip having a pawl portion 14 (Fig. 6 below) seated between adjacent teeth on the distal side of the plate. The pawls are used to engage the teeth along the shaft to prevent displacement of the clip (column 4, lines 9-15).

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to have constructed the clip of Michelson with the pawls of

Keller, in order to allow the pawls to grip the teeth and to prevent displacement of the clip (column 4, lines 9-15).

With regard to statements of intended use and other functional statements, they do not impose any structural limitations on the claims distinguishable over the dynamic spinal plate of Michelson as modified by Keller, which is capable of being used as claimed if one so desires to do so. *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Furthermore, the law of anticipation does not require that the reference "teach" what the subject patent teaches, but rather it is only necessary that the claims under attack "read on" something in the reference. *Kalman v. Kimberly Clark Corp.*, 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987).

Conclusion


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See attached PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jerry Cumberlandge whose telephone number is (571) 272-2289. The examiner can normally be reached on Monday - Friday, 8:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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